of proposed Article IX-A of the 1870 Illinois Constitution. Since that was the result reached by the Illinois Supreme Court, we, therefore, appear here to argue that the decision of the Illinois Supreme Court was: (a) correct, (b) based upon long-standing prior rulings of this Court, (c) adequate to dispose of the issues raised, and (d) sound from a public policy standpoint. This brief will take up (in order) the arguments raised in the three petitions for a writ of certiorari and the one jurisdictional statement to which it is addressed.

OPINIONS BELOW

This entire litigation arises out of the meaning and effect of an amendment to the 1870 Illinois Constitution which was initiated by Senate Joint Resolution #30 of the Illinois General Assembly passed June 30, 1969, submitted to referendum of the electorate of that state on November 3, 1970 and declared ratified on November 25, 1970. The language of that clause, called Article IX-A, is as follows:

> Notwithstanding any other provision of this Constitution, the taxation of personal property by valuation is prohibited *as to individuals.*

The majority, and dissenting opinions, of the Illinois Supreme Court found different legal results emanating from the language of Article IX-A. The majority opinion, written by Mr. Justice Schaefer found the language to be violative of the equal protection clause of the 14th Amendment to the United States Constitution in that:

> "The new article classifies personal property for the purpose of imposing a property tax by valuation, upon a basis that does not depend upon any of the characteristics of the property that is taxed, or upon

the use to which it is put, but solely upon the ownership of the property."

Mr. Justice Schaefer and the majority thus find that a property tax imposed only upon the property held by corporations is unconstitutional. Mr. Justice Davis in his dissenting opinion agrees that the intent of Article IX-A was to impose a personal property tax payable only by corporations. He then goes on to say:

"Here the question for determination is whether, absent the requirement of a state constitution that corporate and individual personal properties be taxed the same, the equal protection clause of the 14th Amendment permits them to be taxed differently? I believe that it does!"

The full opinions of the Illinois Supreme Court, the trial courts and the texts of statutes and constitutional provisions involved are to be found in the three petitions to which this brief is a response.

I.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI BY ILLINOIS ATTORNEY GENERAL ON BEHALF OF A STATE OFFICER — DOCKET NO. 71-685.

* * *

THE FINDING OF THE ILLINOIS SUPREME COURT THAT CORPORATIONS MAY NOT CONSTITUTIONALLY BE SINGLED OUT FOR AD VALOREM PERSONAL PROPERTY TAXATION IS NEITHER NOVEL NOR ERRONEOUS AND IS NOT, ALONG WITH THE RULES OF CONSTRUCTION OF ILLINOIS LAW WHICH EXPOSES THAT INFIRMITY, A PROPER SUBJECT FOR A GRANT OF REVIEW UNDER CERTIORARI JURISDICTION.

On page 27 of Illinois Attorney General William J. Scott's petition, the following statement is to be found:

> "It is submitted that the issues in this case are: (1) Was the majority of the Illinois Supreme Court correct when it held that any distinction between individuals and corporations with the imposition of *ad valorem* personal property taxes was an invidious and unreasonable distinction; (2) Was Justice Davis correct in his dissent when he held that it was reasonable to distinguish between all individually owned personal property as against all corporately owned personal property; or (3) Was Judge Donovan* in error when he ruled that it is reasonable to exempt from the *ad valorem* personal property taxes "the personal property owned by individuals and used for their personal enjoyment and that of their families" and had to continue the tax upon the property of individuals, partnerships and corporations which is used for business and profit-making purposes."

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* Trial judge in case #71-691.

The Attorney General, argues that his proposed Issues No. 1 and No. 2 are within the permissable ambit of certiorari jurisdiction. The substance of those two issues is, of course, whether a personal property tax collectable only from the property owned by corporations is constitutional. These respondents submit that certiorari should not be granted to consider a point so well established in law. Rule 19 of the United States Supreme Court sets out the type of case which the Court might desire to review on certiorari:

> "(b) Where a state court has decided a Federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court . . . ."

A consideration of the opinion of the Illinois Supreme Court and of the case law upon which that opinion relies will show that the criteria of Rule 19 have not been met in the Attorney Generals' petition or in the other petitions.

The majority opinion in finding Article IX-A unconstitutional relies entirely upon the rule of the equal protection clause of the 14th Amendment to the Federal Constitution. Mr. Justice Schaefer writes:

> "It cannot rationally be said that the prohibition promotes any policy other than a desire to free one set of property owners from the burden of a tax imposed upon another set. All of the arguments in favor of the abolition of the Personal Property Tax upon the property owned by natural persons apply with equal force in favor of the abolition of that tax upon the property owned by others."

Since Mr. Justice Schaefer and the majority can find no distinction between the personal property owned by an

individual and personal property owned by a corporation, the court concludes that the constitutional amendment which attempted to bring about such a result must fall on Federal constitutional grounds.

In the Illinois Supreme Court, petitioner Lake Shore correctly contended most strongly that it and other Illinois corporations could not be discriminated against by a personal property tax which applied only to corporate owned property. While the Maynard petitioners disagree with Lake Shore on a number of issues (See Argument III), we are of one mind on the clarity and settled nature of the main constitutional issue at bar. The brief of Lake Shore Auto Parts Co. in the Illinois Supreme Court contained an excellent discussion of the applicable case law in this area. We, therefore, set out pages 18 to 26 of that brief with Lake Shore's permission and our compliments:

> "For nearly ninety years it has been settled doctrine that an ad valorem property tax may not be imposed which discriminates against property owners solely by reason of the fact that they are corporations. Such a classification is *per se* unreasonable, and constitutes a deprivation of the equal protection of the laws guaranteed by the 14th Amendment to the United States Constitution.
>
> "A leading writer states this rule in the following language:
>
> > 'Classification for exemption purposes may be based on the use to which property is devoted, as well as the nature of the property; but property cannot be exempted merely because of its ownership where the same kind of property owned by others is taxed . . . Instead of classifying property for the purpose of exemption either by its characteristics or by its uses, the legislature cannot classify the owners of property according to some characteristic possessed by them, or connected

[Continuation of quoted matter]

with their conduct, and thereupon base an exemption of the property of such persons, regardless of the characteristics possessed by it and of the uses to which it is put.' 1 Cooley on Taxation (4th ed.) ¶280, p. 594.

"Another author has stated 'that there would very probably be no dissent' from the proposition that the United States Supreme Court is prepared to guarantee to all corporations equality with individuals in respect to all property taxation. Sholley, Corporate Taxpayers and the Equal Protection Clause, 31 Ill. L.R. 463, 589 (1937).

"The doctrine, insofar as it is relevant to the case at bar, had its origin in two decisions of the 9th Federal Circuit Court in the *California Railroad Tax* cases: *San Mateo County* v. *Southern Pacific R. Co.*, 13 Fed. 722 (1882), app. dism. per. stip., 116 U.S. 138; and *Santa Clara County* v. *Southern Pacific R. Co.*, 18 Fed. 385 (1883), aff'd. on other grounds, 118 U.S. 394.

"The history and background of these famous cases has been detailed elsewhere.(*) The litigation arose out of a provision of the California Constitution which required that the value of any outstanding mortgage be deducted from the assessed value of real estate, *except as to railroads and other quasi-public corporations*. The chief opinion in each of the cases was written by Justice Field, an Associate Justice of the United States Supreme Court assigned to the circuit. In each case, also, there is a concurring opinion by Justice Sawyer.

(*) See, Sholley, op. cit. supra, 31 Ill. L. R. 463 at 469-74 (1937); McLaughlin, The Court, The Corporation, and Mr. Conkling, 46 Am. Hist. Rev. 45, 52 (1940); and see the dissenting opinion of Justice Douglas, and the concurring opinion of Justice Jackson in *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562, 576, 574 (1949).

[Continuation of quoted matter]

"Justice Field first undertook to meet the argument that the constitutional provision did nothing more than impose a 'reasonable classification', stating (13 Fed., at p. 737-8):

> 'It is not classifying property to provide that the property of certain parties . . . shall be assessed at its value after deducting the mortgage; and that the property of other parties . . . shall be taxed at its full value without any deduction. That is not providing for a different rate of taxation *for different kinds of property, but for unequal taxation according to the character of the owner.*' (emphasis added)

"See also Justice Field's subsequent opinion in the *Santa Clara* case (18 Fed., at p. 408), restating the basis for rejecting the 'reasonable classification' contention, and Justice Sawyer's concurring opinion in that same case (18 Fed. at p. 432).

"To the argument that even if the assessment could not be sustained as a property tax, it ought to be sustained as a franchise tax,—i.e., a 'condition of the continued existence of the railroad corporation', Justice Field presented two answers (13 Fed. at p. 754):

1) The California constitutional provision in question, and the statute thereunder, *were not intended as a franchise tax* or a condition for the continuation of the franchise;

2) The right of the state to exclude the corporation altogether does not mean that the state may, as a condition for continued permission to do business, require the corporation to waive and forego the rights otherwise guaranteed to it by the United States Constitution:

"What the state may do, even with the creations of its own will, it must do in subordination to the inhibitions of the federal constitution."

[Continuation of quoted matter]

"Despite the lack of a definitive Supreme Court decision, the *California Railroad Tax* cases immediately became accepted as the law of the land.

"In *Walker* v. *Northern Pacific Ry.*, 47 Fed. 681, 686 (C.C.N.D. 1891), an act of the North Dakota territorial legislature which placed real estate owned by the Northern Pacific Railroad in a *more* favorable tax status than that of other real estate was held to be violative of the equal protection clause of the United States Constitution.

"The holding of the *California Railroad Tax* cases has been followed on many occasions:

Northern Pacific Ry. Co. v. *Sanders County*, 214 Pac. 596, 599 (Mont., 1923);

State ex rel Northern Pacific Ry. Co. v. *Duncan*, 219 Pac. 638, 640 (Mont., 1923);

Gamble-Robinson Fruit Co. v. *Thoreson*, 204 N.W. 861, 864-5 (N.D. 1925);

Northwestern Improvement Co. v. *State*, 220 N.W. 436, 439-40 (N.D. 1928).

"In those few states wherein income taxes have been held to be taxes on property, it necessarily follows that an income tax applicable only to corporations is an unreasonable classification,—not only under the state constitution, but under the equal protection clause of the 14th Amendment as well:

Redfield v. *Fisher*, 292 Pac. 813 (Ore. 1930), reh. den. sub nom. *Redfield* v. *Norblad*, 295 Pac. 461 (1931), cert. den. 284 U.S. 617 (1931);

Aberdeen S. & L. Ass'n. v. *Chase*, 289 Pac. 536, 541 (Wash., 1930), op. on reh., sub nom. *Washington Mutual Savings Bank* v. *Chase*, 290 Pac. 697 (1930).

"It was not until 1928, in *Quaker City Cab Co.* v. *Pennsylvania*, 277 U.S. 389, that the Supreme Court of the United States was squarely faced with an equal protection challenge to a state tax, not deemed an

[Continuation of quoted matter]

excise tax, which directly discriminated against corporations.

"In the *Quaker City Cab Co.* case, the United States Supreme Court, relying on *The California Railroad Tax* cases, held unconstitutional, as a violation of the equal protection clause a statute of Pennsylvania which imposed a tax on the gross receipts of incorporated taxi-cab companies (both domestic and foreign) while wholly exempting the receipts of unincorporated taxi-cab businesses.

"Although a tax on business receipts is not ordinarily thought of as a property tax, the Supreme Court stated (p. 402):

> 'Here the tax is one that can be laid upon receipts belonging to a natural person quite as conveniently as upon those of a corporation. It is not peculiarly applicable to corporations, as are taxes on their capital stock or franchises. . . . The character of the owner is the sole fact on which the distinction and discrimination are made to depend. *The tax is imposed merely because the owner is a corporation.* . . . It follows that the section fails to meet the requirement that a classification, to be consistent with the equal protection clause, must be based on a real and substantial difference having a reasonable relation to the subject of the legislation.' (emphasis added).

"Three dissenting justices took sharp issue with the majority's view that 'the tax is imposed merely because the owner is a corporation'. They viewed the tax in question as an excise tax, so that 'ownership', as such, had nothing at all to do with it.

"The 'character of the owner', of course, has no bearing whatsoever in the case of a true excise tax. By definition, ownership is irrelevant. The tax is imposed upon the *exercise* of some act or privilege. (See Annotation, What is a Property Tax as Distinguished

[Continuation of quoted matter]

From Excise, License and Other Taxes, 103 A.L.R. 18). In *Bromley* v. *McCaughn*, 280 U.S. 124, 137 (1929), the Supreme Court recognized that an excise or privilege tax may be imposed 'upon the exercise of one of the numerous rights of property, *but each is clearly distinguishable from a tax which falls upon the owner merely because he is owner, regardless of the use or disposition made of his property.*' (emphasis added).

"Presumably, each of the dissenting justices in *Quaker City Cab* would have joined the majority in condemning a true property tax which discriminated against corporations solely on the basis of ownership. In any event, there can be no doubt that the *Quaker City Cab* case stands for the proposition that the equal protection clause prohibits discriminatory taxation against corporations based solely on the ownership of property.

"The *Quaker City Cab* case has been followed in many subsequent cases, in both state and federal courts, e.g.:

Garysburg Mfg. Co. v. *Pender County*, 42 Fed. 2d 500, 506 (E.D.N.C. 1930), rev'd. on other grounds, 50 Fed. 2d 732 (4th Cir. 1931);

Mount Hope Cemetery Co. v. *Pleasant*, 32 Pac. 2d 500, 503 (Kan. 1934);

State v. *Hunt*, 9 N.E.2d 676, 681-2 (Ohio, 1937);

H. Rouw Co. v. *Texas Citrus Comm'n.*, 247 S.W. 2d 231, 234 (Tex. 1952).

"In all of the cases thus far considered, the discrimination held unconstitutional was directed against corporations as such, and in favor of natural persons. Also relevant to the problem at hand is a long and well-established line of cases in the United States Supreme Court which have laid down the rule that a property tax may not, under the 14th Amendment, serve as the basis for discriminating against foreign corporations and in favor of domestic corporations. See *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562, 571-2 (1949),

[Continuation of quoted matter]

and *WHYY, Inc.* v. *Borough of Glassboro*, 393 U.S. 117, 119 (1968).

"Both the Cook County defendants and defendant Lehnhausen rely almost exclusively upon extensive quotations from the case of *Thorpe* v. *Mahin*, 43 Ill.2d 36 (1969), wherein this Court, in the course of upholding the corporate-individual rate discrimination under the Illinois Income Tax Act, indicated the broad scope of classification which is permissible under the equal protection clause of the United States Constitution.

"The language of *Thorpe* v. *Mahin*, however, must be read in the light of the Court's preliminary holding (43 Ill. 2d at p. 42) that:

> 'We hold that the tax in question is not a property tax. . . .'

"The consequence of that holding was not only to free the income tax from the constrants of the uniformity clause of the Illinois Constitution (a matter with which we are not concerned in the instant case), but it also served as an essential prerequisite to this Court's ruling on the equal protection argument. This is demonstrated by this Court's strong reliance, in *Thorpe* v. *Mahin*, upon the leading case of *Flint* v. *Stone Tracy Co.*, 220 U.S. 107 (1911), in which the United States Supreme Court upheld a federal tax exclusively on corporations and measured by net income.

"The result in *Flint* v. *Stone Tracy* depended, in the first instance, upon the Court's characterization of the tax as an excise, rather than a tax on property, and the holding on this point was preceded by an elaborate and enlightened discussion of the problem (220 U.S. at 145-147, 150-152).

"Although the equal protection clause of the 14th Amendment was not directly involved in *Flint* v. *Stone Tracy*, the Supreme Court did repeatedly go out of its way to observe that the criteria for reasonable classification of an excise tax under the 14th Amendment

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are comparable to the criteria under Article I, § 8, Clause 1, of the United States Constitution—the provision involved in *Flint* v. *Stone Tracy*, See, 220 U.S., at pp. 158 and 161.

"*Flint* v. *Stone Tracy* thus stands for two propositions:

(1) That a tax on businesses, measured by net income, is an excise tax and not a property tax. Hence it need not be apportioned among the several states, and it may be 'reasonably classified'.

(2) That it is reasonable to classify the excise so as to impose it only on corporations for the privilege of doing business in corporate form, while at the same time exempting unincorporated businesses and individuals.

"Similarly, *Thorpe* v. *Mahin* stands for two propositions:

(1) That a tax measured by income is not a property tax.

(2) That it is reasonable (under both the state constitution and the equal protection clause of the federal constitution) to classify the tax by imposing it only on corporations for the privilege of doing business in corporate form, while at the same time exempting unincorporated businesses and individuals, or taxing them at a lesser rate or on a different base.

"Neither case offers any support to defendants' apparent contention that a *property tax* may be classified solely on the basis of the ownership of the property."

(End of quoted material.)

The only important case cited by the Attorney General and not discussed in the Lake Shore brief is *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522 (1959). In that case Ohio passed a statute exempting from ad valorem taxation "merchandise or agricultural products belonging to a non-resident . . . if held in a storage warehouse for storage

only". The plaintiff, an Ohio corporation, sued the tax commissioner of the state alleging that the statute denied equal protection of the laws to residents of Ohio. The Supreme Court found that the exemption was constitutional. The Illinois Attorney General attempts to use the Allied case to indicate that the same wide latitude which exists in income tax classification carries over to ad valorem taxation. While the Court does invite state inventiveness in tax classifications, the facts of the *Allied* case and the opinions of the Supreme Court are not helpful to the petitioner's argument. In *Allied,* the classification did not create an exemption based upon a corporate-individual dicotomy. The distinction was not upon ownership but upon residence coupled with a state policy. The majority opinion discussed in detail the possible public policy reasons which might have motivated the Ohio legislature in passing the law.

Unlike the Ohio case, no economic benefit to particular select groups or particular industries was to be brought about by Illinois Article IX-A. In the present case the only motivation which has been or could be suggested for the passage of Article IX-A is that the corporate taxpayer is a lucrative and easy target for taxation. The language previously quoted from Mr. Justice Schaefer's opinion is the best proof that the Illinois Supreme Court sought but was unable to find any legitimate policy motive underlying the admitted discrimination:

> "It cannot rationally be said that the prohibition promotes any policy other than a desire to free one set of property owners from the burden of a tax imposed upon another set."

The argument of the Maynard respondents is not limited to the fact that no public policy justification for the corporate discrimination was presented to nor found to exist by the Illinois Supreme Court. At this late date there is no acceptable public policy justification for the course urged by the Illinois Attorney General. Any attempt to strip corporations of the constitutional protections emanating from the *Quaker City Cab* case must be made in the face of the practical results of such a decision. Courts have agreed that corporations can be compelled to pay franchise taxes and higher rate income taxes for engaging in the same businesses as non-corporate entities. Corporations have, however, for 90 years, been free of arbitrary classification in ad valorem taxation. Corporate decisions and state taxation systems and policies have been made upon this firm and basic assumption of constitutional law. To upset such law would be to make corporations nonpersons for the purposes of the United States Constitution and effectively end the equal protection guarantee in the field of corporate taxation. Such a startling change of American law should hardly be the end result of one small piece of bad draftsmanship by the Illinois General Assembly.

As the third ground for review, the Attorney General presents an approach suggested by the trial court judge in the *Shapiro* case. In *Shapiro,* Judge Donovan thought to avoid all constitutional issues by so interpreting Article IX-A as to free it from any constitutional infirmity. At page A-39 of the Attorney General's petition, a clause of Judge Donovan's order is set out as follows:

> "That Article IX-A is free of the ambiguity and uncertainty of intendment charged by the plaintiffs, and that its intendment is clearly declared to prohibit the taxation of personal property by valuation ex-

clusively as to natural persons, where that property is used, by them, for the personal enjoyment of themselves and their families."

The argument that Article IX-A prohibits the taxation of the non-business personal property of natural persons is an attractive one. In the Maynard respondents' brief and oral arguments before the Illinois Supreme Court, we presented that position to the court as an alternative argument. The alternative argument rests purely upon an appeal to rules of statutory interpretation concerning the meaning of the word "individuals". Such an interpretation, had it been adopted, would have permitted the court to avoid any constitutional issues. Despite the fact that this approach was suggested by the *Maynard* plaintiffs, the State's Attorney of Cook County, and the Attorney General of the State of Illinois, both the majority and dissenting opinion of the Illinois Supreme Court, rejected that tactfully limited interpretation of the phrase "as to individuals". Both Mr. Justice Davis and Mr. Justice Schaefer felt that the only valid issue in this case related to the validity of Article IX-A in light of the equal protection clause. The majority opinion specifically discussed and rejected the proffered interpretation of state law which would have avoided constitutional infirmity.

It has been the oft-stated opinion of the United States Supreme Court that it is bound by judgments of State Supreme Courts on questions of state law. *Henry* v. *Mississippi*, 379 U.S. 443 (1965); *Scripto, Inc.* v. *Carson*, 362 U.S. 207 (1960); *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94 (1952); *Madden* v. *Kentucky*, 309 U.S. 83 (1940). Thus, the United States Supreme Court has bound itself to accept a State Supreme Court's construction of a State Constitutional provision or statute. *Cramp* v. *Board of Public*

Instruction, 368 U.S. 278 (1961); *First National Bank* v. *Ayers*, 160 U.S. 660 (1896). Petitioner's third stated issue flies in the face of this established principle of Federal law.

In the case at bar, the Illinois Supreme Court has considered and unanimously rejected the contentions stated by the Illinois Attorney General as Issues No. 1, 2, and 3. By its own decisions, the United States Supreme Court should not grant certiorari to reconsider either a matter of long-standing Federal law or a state statutory interpretation previously disposed of by the highest court of the state.

II.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI BY STATE'S ATTORNEY OF COOK COUNTY ON BEHALF OF COUNTY OFFICERS— DOCKET NO. 71-691.

* * *

THE ILLINOIS CONSTITUTION OF 1970, EFFECTIVE JULY 1, 1971, MADE NO CHANGE IN THE CRITERIA GOVERNING DECISION OF THIS CASE. THE ILLINOIS SUPREME COURT DID NOT IGNORE OR OVERLOOK THE NEW ILLINOIS CONSTITUTION BUT CORRECTLY CONCLUDED THAT THE BASIC FEDERAL QUESTION, INVOLVING VIOLATION OF THE EQUAL PROTECTION CLAUSE, REMAINED UNAFFECTED BY THE NEW CONSTITUTION.

The petition for writ of certiorari, filed by Edward J. Barrett, County Clerk of Cook County, et al., is devoted almost completely to arguments concerning the adoption of the Illinois Constitution of 1970 which became effective several days prior to the rendition of the opinion and judgment herein sought to be reviewed. Without explaining how the new Constitution remedied the invidious discrimination implicit in Article IX-A of the 1870 Constitution and violative of the equal protection clause, petitioners charge that the Illinois Supreme Court ignored the new constitution, which in their view introduced a new dimension in this case. In developing this theme, they present a number of unsupported and irrelevant variations. For example, in "Questions Presented" they gratuitously demand to know how "the highest court of the state can ignore the existence of the new state constitution . . . and circumscribe the extent of its examination in determining the public policy of the state . . .?" They ask how the court could ignore the context in which Article IX-A of the prior constitution was adopted, claiming the constitutional

amendment which was held invalid was "the first step of the program provided in the new constitution for the eventual abolishment of the personal property tax." They strongly imply that either by oversight (Pet. p. 39) or by deliberate design (Pet. p. 5) the Illinois Supreme Court ignored its own precedents and failed to apply the law existing at the time of decision in favor of the law existing at the time the case arose. Petitioners even go so far as to argue that by failing to mention the new constitution of 1970 in its opinion, the Illinois Supreme Court "caused to be born . . . a substantial federal question impelling this court's consideration . . ." (Pet. p. 5).

We take issue with these arguments of the petitioners. The contention that the Illinois Supreme Court ignored or overlooked the advent of the Illinois Constitution of 1970 is totally unsupportable in point of fact. The petitioners' arguments that the Constitution of 1970 requires validation of Article IX-A are likewise without merit in point of law.

To argue that the Illinois Supreme Court would ignore or overlook such an important development in the supreme law of the state as the taking effect of a new constitution is scarcely plausible on its face. The facts are totally the other way. Both in the briefs and in the oral arguments presented to that Court, the new constitution was the subject of serious and repeated references by counsel for the several parties. The leave granted to these respondents (as petitioners in Maynard No. 44308) to file as a matter of original jurisdiction their petition for declaratory judgment, was in response to their petition which recited the importance of considering the new constitution, as well as the old, in deciding the issues of the case and contained their offer to make such a presentation to the Court. One of the respondents' attorneys who par-

ticipated in the arguments before the Illinois Supreme Court, served as President of the Sixth Illinois Constitutional Convention, the body which drafted the new constitution. Clearly the court was aware of the new constitution and its provisions relating to personal property taxation.

It should be obvious that there is no rational basis for concluding, as petitioners have done, that because the court failed to mention the new Constitution in its opinion it either ignored or overlooked the document. It is evident from the opinion that the court viewed the basic Federal constitutional question, i.e., the violation of the equal protection clause, as unaffected by the emergence of the Illinois Constitution of 1970.

Petitioners would justify the invidious discrimination implicit in the constitutional amendment by urging upon this court that there is a public policy in Illinois which looks to ultimate abolishment of all *ad valorem* personal property taxation. That such a policy exists is clear; that such a policy cannot justify violation of the equal protection clause is equally clear. Petitioners assert (and petitioner Lake Shore Auto Parts, Inc. (Pet. p. 7) makes a similar argument) that Article IX-A was the initial step in a program of the new Constitution to end all such taxation by 1979. These interpretations are at the best but half truths, and petitioners are totally in error if they mean to assert that the new Constitution mandates immediate abolishment of individual personal property taxes. To the contrary, the new document carries forward only such individual exemptions as shall ultimately be defined and held valid by the courts. That, of course, is what the present case is all about and hence petitioners beg the question by their circuitous argument.

The Constitutional amendment, which is at issue in this case, was proposed by Senate Joint Resolution No. 30 enacted by the Illinois General Assembly *following* the call of the Constitutional Convention and *prior* to its convening. The amendment was required to be voted on at the general election of November 3, 1970, which occurred prior to the referendum on the new constitution.

Thus, throughout its deliberations, the Convention was faced with a drafting dilemma. It was necessary for it either to structure any revenue article of a new constitution with concern for the meaning, application and legal effect of the pending Constitutional amendment—matters which were anything but clear; or it could proceed to draft new provisions without concern for the pending proposition—a course publicly unacceptable. The difficulty was also compounded by the doubts which existed concerning the interpretation of the word "individuals" as used in the amendment and doubts concerning the constitutionality of particular interpretations under the equal protection clause. A measure of the uncertainty felt by many delegates to the Convention was aptly expressed in floor debate by Stanley C. Johnson, a member of the Revenue Committee, who stated:

> "Mr. President, the amendment in November is clouded with so much uncertainty as to its application that we will be years, we fear, trying to figure out what it really means. There have been opinions registered that it will not apply to joint tenants, that it will not apply to trusts, that it will not apply to partnerships. Certainly it will not apply to corporations. So that it may eventually boil down to what it applies to is whether or not the property is used in the production of income or not." (June 25, 1970, Transcript Vol. 74, p. 11)

Professor Dawn Clark Netsch, who served as Vice Chairman of the Revenue Committee (referring to Section 5(b) of Article IX of the Constitution of 1970, hereinafter quoted) wrote in the November, 1970 issue of the Chicago Bar Record, p. 114:

> "The coverage of this subsection depends, in turn, on the coverage of the proposed November amendment abolishing the tax 'as to individuals'. Presumably, the courts will have settled these questions by the time the personal property tax is finally eliminated in 1979. If the courts should decide—possibly to avoid equal protection issues—that an individual engaged in a retail grocery business as a sale proprietorship is not relieved of paying the personal property tax pursuant to the November referendum because his competitor down the street, who is incorporated, is not relieved, that business individual would be picked up by subsection (c) and relieved of the tax in the second phase-out. He would then be liable for a share of the replacement tax."

In this context of timing problems and uncertainties as to meaning and legality the Convention drafted a constitutional program, subsequently approved by the voters, which provided for *legislative* phasing-out of all *ad valorem* personal property taxation by 1979, with safe-guards to avoid disasterous results to the public schools and municipal services. The program did not mandate the immediate exemption of individuals from personal property taxation as suggested by petitioners. It merely provided for the recognition of such abolition of individual personal property taxation, if any, as the courts would determine to have occurred under the preceding constitution as amended by Article IX-A.

The program is set forth in Article IX, Section 5 of the 1970 Constitution, reading as follows:

"Section 5. PERSONAL PROPERTY TAXATION
(a) The General Assembly by law may classify personal property for purposes of taxation by valuation, abolish such taxes on any or all classes and authorize the levy of taxes in lieu of the taxation of personal property by valuation.
(b) Any ad valorem personal property tax abolished on or before the effective date of this Constitution shall not be reinstated.
(c) On or before January 1, 1979, the General Assembly by law shall abolish all ad valorem personal property taxes and concurrently therewith and thereafter shall replace all revenue lost by units of local government and school districts as a result of the abolition of ad valorem personal property taxes subsequent to January 2, 1971. Such revenue shall be replaced by imposing statewide taxes, other than ad valorem taxes on real estate, solely on those classes relieved of the burden of paying ad valorem personal property taxes because of the abolition of such taxes subsequent to January 2, 1971. If any taxes imposed for such replacement purposes are taxes on or measured by income, such replacement taxes shall not be considered for purposes of the limitations of one tax and the ratio of 8 to 5 set forth in Section 3(a) of this Article."
(Underscoring supplied)

In view of the clear and unambiguous language of Section 5(c), it is futile for petitioners to argue that the Illinois Supreme Court erred in failing to apply the law existing at the time of its decision and to argue that it departed from its own rule concerning applicable law stated in *Illinois Chiropractic Society* v. *Giello,* 18 Ill. 2nd 306 (1960). The duty of the court under the new constitution was to

determine whether any *ad valorem* personal property taxation had been abolished "on or before the effective date" of the new constitution. By necessity, this required the testing of Article IX-A under the standards prescribed under the preceding Illinois Constitution of 1870 and principally under the Federal Constitution. To argue, as petitioners do, that the omission in the opinion of any reference to the new state constitution, in and of itself deprived them of due process and equal protection of the laws in consequence of which this Honorable Court should now supervise and "set aright" the highest court of Illinois, is at once irresponsible and fatuous.

Even if the drafters of the new Illinois Constitution had sought to incorporate Article IX-A into the continuing fundamental law of the state, which petitioners erroneously contend was the case, it is obvious that such an incorporation could not validate a phrase repugnant to the 14th Amendment of the Federal Constitution. The Cook County State's Attorney is really arguing that even if Article IX-A creates an unconstitutional exemption, that defect will be cured in the course of 8 years as everyone becomes exempt. No cases or theories can be cited to support such an ephemeral and transitory view of equal protection. As was shown in Argument I, if Article IX-A taxes corporate personal property and exempts all else it is unconstitutional irrespective of any trappings of rationale or good intention with which petitioners may seek to clothe it.

The basic question remains unaffected by the new Illinois Constitution. That question is whether or not the creation of a given classification of property taxpayers finds its justification in more than a desire to free one class from taxation while imposing a property tax upon another. Certainly any future classification adopted by the Illinois General Assembly pursuant to Article IX, Section 5(a)

of the new Constitution will be similarly tested under Federal standards. If, as in the case of Article IX-A of the 1870 Constitution, it should be found to discriminate invidiously it will likewise violate the requirement of equal protection of the laws of the 14th Amendment and be without force or effect.

This basic fact cannot be sidestepped by the reiteration of vague and amorphous appeals to "public policy", (Pet. p. 4) incantations concerning the "exquisite, juridical intimacy" (Pet. p. 3) of old and new constitutions, unwarranted charges of judicial oversight or neglect and similar arguments designed to ignore the fundamental issue. We submit that the Barrett petitioners have failed to present to this Honorable Court any valid reason for issuance of the Writ of Certiorari.

III.

MOTION TO DISMISS AND BRIEF IN OPPOSITION TO PETITION OF LAKE SHORE AUTO PARTS CO.— DOCKET NO. 71-674.

* * *

WHERE A LITIGANT CONCEDES THAT ITS CLAIM OF UNCONSTITUTIONALITY HAS BEEN CORRECTED BY THE DECISION OF A STATE SUPREME COURT AND BENEFIT HAS THEREBY BEEN BROUGHT TO THE LITIGANTS CLASS, A FURTHER APPEAL SHOULD NOT BE GRANTED ON THE SOLE GROUND THAT A FINANCIALLY MORE BOUNTIFUL RESULT IS SOUGHT.

In case No. 71-674, the Lake Shore Auto Parts Company seeks to invoke the jurisdiction of this court either by appeal or by certiorari. The supposed right to appeal emanates from 28 U.S.C. Section(2) which reads as follows:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows: . . . (2) by appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United State, and the decision is in favor of its validity."

This Court may wonder why all other parties to the consolidated cases appear to be arguing the questions of constitutionality of Article IX-A of the Illinois Constitution while Lake Shore Auto Parts is arguing the invalidity of a statute, i.e., the Illinois Revenue Act. In order to answer that question, the options of advocacy open to Lake Shore prior to filing their litigation must be considered.

Lake Shore Auto Parts Company is an Illinois corporation. In the trial court its case was brought as a class action on behalf of all corporations in the state. Lake

Shore most effectively represents its class when it succeeds in bringing about a total abolition of personal property taxes for corporations. This result would not be accomplished if Lake Shore attacked the constitutionality of Article IX-A. If Article IX-A is unconstitutional, then the prior provisions of Illinois law will continue in force until changed. Under the existing revenue act, corporations, business entities and individuals (however that term be defined) would continue to be subject to personal property taxation. (Chapter 120, Section 499, Illinois Revised Statutes (1969).) Such is the result brought about by the decision of the Illinois Supreme Court. The optimum result for a litigating corporation would be not the sharing of taxation but the abolition of the tax for corporations and, ironically, for everyone else as well. The Lake Shore Auto Parts Company has constructed its argument in the trial court, in the Illinois Supreme Court, and in this court with that goal in mind.

The complaint of Lake Shore Auto Parts Company in the trial court did not allege the unconstitutionality of Article IX-A; instead, Lake Shore was scrupulously careful to limit its constitutional attack to a prior existing revenue statute rather than to the constitutional amendment. Its argument can be paraphrased as follows:

> *The Revenue Act of the State of Illinois (Chapter 120, Section 482, et seq., Illinois Revised Statutes, 1969) provided prior to the passage of Article IX-A for ad valorem personal property taxation of all real and personal property in the State with certain exceptions. The effect of the passage and approval of Article IX-A was to amend the Revenue Act so as to repeal the personal property tax for all but corporations. Once this amendment by implication was accomplished, it is the personal property tax statute which must itself be swept away as a violation of the 14th Amendment because of its discrimination against*

corporations. The new amendment to the Illinois constitution is thus ignored and allowed to stand. The result of this theory of interpretation is that the Illinois Revenue Act, as it relates to personal property is, in its entirety, declared unconstitutional.

Since the Revenue Act is the only statutory enactment of the state regarding the establishment of a personal property tax, the result of such a judicial finding would be an immediate abolition of ad valorem personal property for all taxpayers in the state.

At the trial court level, *Lake Shore* was able to achieve the amazing result of the judicial abolition of an established and important tax by averting the view of the court from the question of the constitutionality of Article IX-A itself. The *Maynard* respondents submit that since Article IX-A so defines individuals as to exclude only corporations from the scope of its exemption, that it is irretrievably unconstitutional. We as respondents, likewise, submit that the Illinois Revenue Act (which has been constitutional for 30 years) has not suddenly become unconstitutional.

Section 499 of the Illinois Revenue Act (Chapter 120, *Illinois Revised Statutes,* 1969) has, since 1939, defined the personal and real property of this state which is subject to taxation. Sections 500 through 500.23 of the Act define property put to certain uses as exempt from such taxes. It would need little argument to show that if a particular exemption adopted by statute were unconstitutional it would be the exemption rather than the entire tax which would fall. An exemption, for example, of all personal property owned by United States Congressmen would undoubtedly fall before a constitutional attack. Such an attack, however, would leave the general personal property tax enabling section unaffected and in full force. This case differs from that situation in only one respect. The exemp-

tion is contained not in the Revenue Act but in the Constitutional amendment, Article IX-A. That difference, however, can hardly justify the effect of the *Lake Shore* trial court's ruling which was to uphold the enactment that created the invidious distinction and to strike down the enactment that did not. Such a strange ruling could only be the result of the trial court's misconception that as between a valid and constitutional statute and a constitutional amendment that creates an invidious classification, the statute must fall to save the constitutional amendment. Such is not the law.

In *Reitman* v. *Mulkey*, 387 U.S. 369 (1967), an amendment to the California Constitution would have repealed prior "open housing" statutes. This Court affirmed the judgment of the California Supreme Court which ruled the *constitutional amendment* to be unconstitutional and the prior statutes to remain in effect. In reaching its decisions, the California Court looked to several factors:

> A state enactment cannot be construed for purposes of constitutional analysis without concern for its immediate objective (In re Petraeus (1939) 12 Cal. 2d 579, 583, 86 P.2d 343; see Griffin v. County School Board, 377 U.S. 218, 231, 84 S.Ct. 1226, 12 L.Ed.2d 256), and for its ultimate effect (Jackson v. Pasadena City School Dist. (1963) 59 Cal.2d 876, 880, 31 Cal. Rptr. 606, 382 P.2d 878; Gomillion v. Lightfoot (1960) 364 U.S. 339, 341-343, 81 S.Ct. 125, 5 L.Ed.2d 110; Avery v. State of Georgia (1953) 345 U.S. 559, 562, 73 S.Ct. 891, 97 L.Ed. 1244; Near v. State of Minnesota (1931) 283 U.S. 697, 708-709, 51 S.Ct. 625, 75 L.Ed. 1357). To determine the validity of the enactment in this respect it must be viewed in light of its historical context and the conditions existing prior to its enactment. (Select Base Materials v. Board of Equalization (1959) 51 Cal.2d 640, 645, 335 P.2d 672; Evans v. Selma Union High School Dist. (1924) 193 Cal. 54, 57-58, 222

P. 801, 31 A.L.R. 1121; see Snowden v. Hughes (1944) 321 U.S. 1, 8-9, 64 S.Ct. 397, 88 L.Ed. 497.)
[*Mulkey* v. *Reitman*, 50 Cal. Rep. 881, 884]

The Supreme Court of the United States specifically endorsed this method of interpretation and announced that: "Judgments such as these we have frequently undertaken ourselves." [citing cases] (387 U.S. at 373)

The *Reitman* case involved racial discrimination while the case at bar involves economic discrimination. In the *Reitman* case the Court looked to the entire state of the law. Both the constitutional amendment and the statute had to be construed together to test whether a constitutional result would be reached. When the two enactments read together lead to unconstitutionality, the enactment most responsible for that result was ruled to be void. Thus this Court rejected the argument that the constitutional amendment there in question was valid while the underlying statutes must fall. The effect of the California *constitutional amendment* was to sanction racial discrimination. Likewise, in the case at bar, it is the constitutional amendment and not the (revenue) statute which effects a violation of the equal protection clause.

Article IX-A must be viewed together with other pertinent provisions of Illinois law. If, as the *Lake Shore* trial court ruled, Article IX-A causes the Revenue Act to be unconstitutional, it will abolish all personal property taxes in the state. Such a result would not be consistent with the intent of the Legislature in proposing the amendment nor consistent with the intent of the people in approving the amendment. Both the Legislature and the people contemplated that some class or classes would continue to pay personal property taxes even after the effective date of Article IX-A. Whatever the Legislature and the people had in mind, it can at least be said that they anticipated a limited

tax exemption and not a total tax abolition. In *Village of Glencoe* v. *Hurford*, 317 Ill. 203, 148 N.E. 69, the Illinois Supreme Court said:

> "When the literal enforcement of a statute would result in great injustice and lead to consequences which the legislature could not have contemplated, the courts are bound to presume that such consequences were not intended and will adopt a construction which it may be reasonable to presume was contemplated by the Legislature." (at 220)

That Court has also said:

> "If a statute admits of two constructions, one of which renders the enactment reasonable and salutory while the other renders it mischievous, if not absurd, the latter construction should be avoided."
> [*Karlson* v. *Murphy*, 387 Ill. 436, 443]

The *Lake Shore* interpretation of Article IX-A would, in the most offhanded the unconscious of ways, entirely repeal an important tax utilized by almost every public body in Illinois. The Illinois Supreme Court, by ruling that Article IX-A alone was violative of the 14th Amendment, continued the validity of the Illinois Revenue Act as it existed prior to November 1970. The public bodies of Illinois thus will continue to receive adequate funding, and the Legislative (and ultimately the people of this state) will be free to more clearly define their desires by statutory or constitutional action under "phasing out" provisions provided in Section 5 of Article IX of the new Illinois Constitution.

Lake Shore seeks to invoke the Appellate jurisdiction of this court by the intriguing argument that its attack upon the constitutionality of the revenue act was rejected by the Illinois Supreme Court. The Lake Shore petitioner admits (at page 11 of its brief to this Court) the following:

> "It is true that the result reached by the Illinois court does eliminate the unconstitutional discrimination which would otherwise exist as a consequence of the interaction between Article IX-A and the revenue act."

The petitioner's objection, however, is that the Illinois Supreme Court has chosen the wrong act to declare unconstitutional. Where by its own admission the unconstitutionality complained of has ceased and no new unconstitutionality has thereby been created, the appellant surely has no recourse to the appellate jurisdiction of this Court under Section 1257(2) in order to achieve still greater economic benefit for the class it seeks to represent.

In his petition for certiorari, the Lake Shore brief introduces the inventive, though transplanted, concept of "chilling" into a civil litigation involving taxation (Lake Shore brief p. 10). The basic argument is that Lake Shore began this litigation to free itself from a tax from which others were unconstitutionally exempt. Lake Shore complains that for all its trouble, it ended up by having the tax restored. Lake Shore and other potential attackers of economic discrimination are thus, we are told, chilled from commencing or proceeding with such publicly important and valuable litigation. The argument falters on a number of grounds:

(1) No cases cited by Lake Shore to support the concept of economic chilling come remotely near the case at bar. All fourteen cases cited* exemplify the two decade

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*[1] *Wieman* v. *Updegraff*, 344 U.S. 183 (1952): teachers' loyalty oath invalidated; freedom of association (1st) and due process (14th); concurring, Frankfurter, Jr. referred to the oath as an "unwarranted inhibition upon the free spirit of teachers" and of its "tendency to chill . . . free play of the spirit." [p. 195]. [2] *Shelton* v. *Tucker*, 364 U.S. 479 (1960): teachers' organization membership affidavit invalidated; freedom of association (1st) and due process

old concept that certain freedoms and civil liberties can be chilled by governmental enactments which restrict the right

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[11] (Continued)
(14th). [3] *Smith* v. *People*, 361 U.S. 147 (1959): ordinance imposing criminal liability upon bookseller for possession of obscene book invalidated; freedom of press (1st) and due process (14th). [4] *Anderson* v. *Martin*, 375 U.S. 399 (1964): statute requiring racial identifications on ballots, etc., invalidated; racial discrimination, equal protection (14th). [5] *Freedman* v. *Maryland*, 380 U.S. 51 (1965): movie censorship law invalidated; freedom of expression (1st) and due process (14th). [6] *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965): statute creating offense for failure to register as Communist-front organization, inter alia, invalidated; freedoms of association and speech (1st) and due process (14th); chilling effect of threatened prosecution. [7] *Harman* v. *Forssenius*, 380 U.S. 528 (1965): poll tax and residency certificate invalidated; 24th and 14th Amendments. [8] *Griffin* v. *California*, 380 U.S. 609 (1965): California Constitutional provision permitting court and counsel to comment on defendant's failure to testify invalidated; self-incrimination (5th) and due process (14th). [9] *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967): statute permitting right of privacy actions for public statements invalidated; freedom of press and speech (1st and 14th). [10] *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967): statutes aimed at subversive expression and associations invalidated; freedoms of speech and association (1st and 14th). [11] *U. S.* v. *Jackson*, 390 U.S. 570 (1968): statute authorizing only jury to impose death penalty under Kidnapping Act invalidated; right to plead not guilty (5th) and right to jury trial (6th). [12] *Walker* v. *Birmingham*, 388 U.S. 307 (1967): parade permit; freedoms of speech and association (1st). [13] *Shapiro* v. *Thompson*, 394 U.S. 618 (1969): statute requiring one year residency for welfare invalidated; right to travel, due process (5th and 14th). [14] *Palmer* v. *Thompson*, ... U.S. ....., 91 S.Ct. 1940 (1971): refusal to find 13th and 14th Amendment violations when city closed public segregated swimming pools upon judgment operation of same is unconstitutional. Dissent argued that the effect of this State Action was to chill the assertion of constitutional rights by penalizing those who chose to assert them.

to expression of these freedoms. The cases principally involve the limitation of First Amendment freedoms by state or local laws. The only chilling effect suggested by the Lake Shore petitioner is that it didn't get exactly what it sought in its lawsuit. If such a right to fully succeed in litigation were constitutional, the day of glory would be upon us.

(2) In truth, the decision of the Illinois Supreme Court does have a chilling effect upon Lake Shore, but such effect is hardly of constitutional significance. That chill relates only to class action damages and legal fees. As has been noted, the Lake Shore case was filed by a single small auto parts corporation on behalf of all corporations in the state. If Lake Shore could have succeeded in the Illinois Supreme Court in having its trial court decision sustained, over $250,000,000.00 in taxes would have been instantly abolished. The class action damages and attorneys fees to be awarded in such a triumph would surely have warmed client and attorney alike. In that sense, and only in that sense, did the Illinois Supreme Court's opinion chill the Lake Shore petitioner.

(3) If the Lake Shore petitioner were truly interested in itself and its class being placed on a constitutional equality with all other Illinois taxpayers, it would applaud the decision of the Illinois Supreme Court. The Illinois Supreme Court removed the exemption from "individuals" and placed all such taxpayers back in the taxpaying pool. The tax burden is thus shared once again by corporations and individuals. The corporations of the state and Lake Shore itself therefore benefited financially by the broadened tax base. The prayer of the Lake Shore Auto Parts Co. for constitutional equality was granted by Mr. Justice Schaefer's opinion. That the prayer was not answered more bountifully should hardly concern this court.

The *Maynard* respondents submit the arguments put forward by Lake Shore are not sufficient to cause this Court to either note probable jurisdiction or issue its writ of certiorari.

CONCLUSION

In a well litigated and vigorously contested lawsuit the Illinois Supreme Court found that the Constitution of the United States would not be bent so as to make corporations the only payers of the Illinois ad valorem personal property tax. The Court, perhaps realizing that corporations can hardly defend themselves at the polls against invidious discrimination, rejected the attempts of legislators to bestow such a singular burden upon them. The Illinois Supreme Court relied upon established precedents of this Honorable Court in reaching its politically unpopular but legally correct and just result. This Court need hardly hear the case to restate the point that the equal protection clause of the 14th Amendment does not shift with prevailing political winds. Therefore the motion to dismiss should be granted and the petitions for writ of certiorari denied.

Respectfully submitted,

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